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RANGANATHAN BOOK SYMPOSIUM SYMPOSIUM

Ranganathan Book Symposium: Part 1

James Crawford: Introducing "Strategically Created Treaty Conflicts and the Politics of International Law"

JAMES CRAWFORD — 30 March, 2016

International legal scholarship tends to address the political substrate of international law in one of two extreme modes: either by not dealing with it at all and engaging only with the doctrinal surface; or by being entirely consumed with it and reducing doctrinal form to insignificance. In Dr Ranganathan's chosen field of inquiry — treaty conflict — these modes involve either the fixed assumption that treaty conflicts are inadvertent by-products of the increasing numbers of treaties, to be resolved by application of formal

rules and procedures; or that treaty conflicts merely confirm the epiphenomenal character of international law.

As I wrote in my foreword to the book, Dr Ranganathan challenges both these approaches. Arguing that treaty conflicts are often purposefully created by States for the purpose of catalysing changes in multilateral legal regimes, she offers (to quote Professor Sabrina Safrin's perceptive book review) such conflicts as a 'Petri dish' where we can examine the dance – if that is not too choreographed an expression – between law and political power. She finesses existing understandings in four respects.

First, she departs from a long tradition of argument over the appropriate definition of the concept of 'treaty conflict' (i.e. whether it includes only instances where treaties provide for mutually exclusive obligations, or also those of incompatibilities between rights or even powers and obligations), showing that from the perspective of their impact upon international relations there is no distinction between them. A conflict between a right granted or recognized or a power conferred by one treaty and an obligation provided under another may, depending upon the context, involve a greater challenge to the stability and coherence of an existing legal regime than an outright conflict of obligations. Denying to the former the status of a treaty conflict properly so-called makes little difference. Dr Ranganathan, instead, calls attention to other features of treaty conflicts that may be more important: the strategic context; the lack of identity between their parties, bringing into play the doctrinal restrictions of the *pacta tertiis* rule; and the possibility, through a cleverly leveraged conflict, of challenging a hard-won multilateral treaty regime through a bilateral or 'small-group' treaty.

Secondly, she shows that treaty conflicts that display these characteristics are not fully or adequately addressed through current legal rules, whether those provided in the Vienna Convention on the Law of Treaties or those suggested, in numerous works, as rules of thumb for reconciling or allocating priority between conflicting treaties. The problem does not lie with the rules themselves. Dr Ranganathan, following Jan Klabbers, *Treaty Conflict and the European Union*, argues that legal rules *cannot* address such conflicts unless they depart from foundational principles of treaty law. Alternative proposals, by Hersch Lauterpacht amongst others, infringe or ignore the *pacta tertiis* rule, the rule that treaties between different parties are *res inter alios acta*, and States' freedom to enter into treaties.

That legal doctrine cannot offer satisfactory solutions to a variety of treaty conflicts may lead to the conclusion that there is little point in further analysis, that international law can contribute little to regulating a phenomenon that nonetheless challenges its own systemic character and, worse still, that we must accept the critique that international law is reduced to a form of 'managerialism'. Dr Ranganathan's further contribution lies in challenging these conclusions.

Thus, thirdly, by way of detailed studies of treaty conflicts strategically created in order to challenge, respectively, the deep seabed mining regime under the UN Convention on the Law of the Sea, the International Criminal Court established by the Rome Statute, and the nuclear governance regime underpinned by the Nuclear Non Proliferation Treaty, she shows that international law is neither an epiphenomenon nor the simple instrument of politics. In truth, legal forms

play a role in framing the scope and terms of the conflict, mediating interactions and moderating outcomes. She is careful not to suggest that the limits introduced by international legal practices are necessarily for the good—they may indeed be obstructive to some interests and from some perspectives—but she does maintain that they are real, significant and not easily wished away; reminders that there is indeed a 'system' of international law, that becomes visible precisely in the moments of challenge that arise from treaty conflicts. Canvassing a range of socio-legal materials, the studies offer rich analyses of three distinct and – with a renewal of interest in seabed mining – topical regimes. They are the core of this book.

Dr Ranganathan, finally, uses treaty conflicts as a prism to explore the conceptions of international law underlying legal thought that she describes as 'mainstream', In particular, she engages with the International Law Commission's work on the Vienna Convention on the Law of Treaties, during which it devoted significant efforts to identify an appropriate conflict rule. She also explores some key writings on treaty implementation—from Lauterpacht and Rosenne's doctrine of approximate application to the compliance scholarship of the US academy, to recent work on regime interaction (e.g. Young, *Trading Fish, Saving Fish*). These works are dispersed in time and tradition, but, as she shows, they have in common their engagement with the politics of international law and their ultimate conception of law, not as rules or procedures, but as a discourse anchored in both. She argues that this conception is founded on liberal and constructivist assumptions about international law. On this view, engaging in a legal discourse has the effect of advancing the rule of law by moderating positions and outcomes; the very experience of engaging through law can strengthen respect

for the rule of law. It is this understanding of law's path of influence that also explains and justifies the much criticised Article 30 of the Vienna Convention. She is largely sympathetic with, though occasionally sceptical of, the liberal assumption; she rightly does not seek to prove or disprove constructivist positions. But her reading finesses summary judgments, whether of naïve idealism or rigid doctrinalism, often visited upon international law's mainstream.

Dr Ranganathan describes the book as written with interrelated aims: to explore the law and practice of treaty conflict, and to examine what that particular exploration reveals about the relationship between international law and international relations. The book succeeds in these aims. Although, as the supervisor of the doctoral dissertation on which this book is based, I leave its evaluation to the other symposium participants, it is on any view a fine first achievement by a promising scholar.

James Crawford is now a Judge at the International Court of Justice. Surabhi Ranganathan wrote her doctoral dissertation on strategically created treaty conflicts under his supervision at Cambridge. For the purposes of this introduction, he draws upon the Foreword that he wrote for the book.

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